



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**WAGGONER CARR
ATTORNEY GENERAL**

December 31, 1964

Honorable James A. Morris
District Attorney
Orange County Courthouse
Orange, Texas

Opinion No. C-370

Re: Whether a navigable bayou located wholly in Orange County, Texas, is subject to the provisions of the River and Harbor Act of Congress, and also whether the construction across said bayou of a fixed span bridge with a vertical clearance of 35 feet is taking of property for which the State or County would be liable to an upstream landowner whose ships require a minimum vertical clearance of 55 feet.

Dear Mr. Morris:

You have requested an opinion from this office on the following matters:

Whether a navigable bayou located wholly in Orange County, Texas, is subject to the provisions of the River and Harbor Act of Congress, and also whether the construction across said bayou of a fixed span bridge with a vertical clearance of 35 feet is taking of property for which the State or County would be liable to an upstream landowner whose ships require a minimum vertical clearance of 55 feet.

Your opinion request shows that the State Highway Department has proposed to replace a turn style bridge across Cow Bayou with a fixed span bridge with vertical clearance for shipping of at least 35 feet. It is the further understanding of this writer that the State Highway Department is in the process of getting this proposed bridge approved by the Corps of Engineers. Your correspondence also shows that there is under construction a shipyard upstream from said proposed bridge, and that the landowner's ships require a vertical clearance of 55 feet in order to pass unobstructed from said shipyard to the Gulf of Mexico.

In answer to your question concerning whether the provisions of the River and Harbor Act of Congress applies to Cow Bayou, a navigable stream, the United States Supreme Court in Gilman v. Philadelphia, 70 U.S. 96 (1866) held that the commerce clause of the Federal Constitution furnishes the justification for the superior control of navigable streams by the Federal Government.

Now turning our attention to the question whether the State of Texas or Orange County would be liable for damages due to the construction of the proposed fixed span bridge, when and if approved by the Corps of Engineers, the United States Supreme Court in Gilman v. Philadelphia, supra, in upholding a decision in which a Plaintiff sought to enjoin the construction of a bridge without a draw, stated:

"It must not be forgotten that bridges, which are connecting parts of turnpikes, streets, and railroads, are means of commercial transportation, as well as navigable waters, and that commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs."

The same court in a later opinion, Miller v. Mayor of New York, 109 U.S. 971 (1883), a suit to restrain the erection of a bridge between the cities of New York and Brooklyn because vessels engaged in foreign commerce would have to strike part of their masts due to the vertical clearance and thus increase their towage fee, held:

"Every public improvement, whilst adding to the convenience of the people at large, affects, more or less injuriously, the interest of some . . . Every railway in a new country interferes with the business of stage coaches and sideway taverns; and it would not be more absurd for their owners to complain of and object to its construction than for parties on the banks of the East River to complain and object to the improvements which connects the two great cities on the harbor of New York."

The Court in United States v. 412,715 Acres of Land, Contra Costa County, California, 53 F.Supp. 143 (N.D. Calif. 1943) at page 148 stated:

". . . In controlling, improving, and regulating, the navigability of waters the Government traditionally acts for the benefit of the navigating public.

Unquestionably, it may deepen channels, widen streams, erect lighthouses, build bridges, construct dams, and make similar improvements without compensating the owners of land subject to the navigation servitude. All these things are clearly in aid of the 'greatest public utility' . . ." (Emphasis added.)

The Supreme Judicial Court of Maine in Frost v. Washington County Ry. Co., 51 A. 806 (MaineSup.Ct. 1901), a case concerning the closing of a channel to navigation by the construction of a railroad trestle 3/4 mile from the plaintiff's property in which plaintiff claimed he had a cause of action against the railroad company for injury to his property and business, held:

"This claim cannot be sustained. The only right of the plaintiff interfered with by the defendant company was his right of navigation by water in and out of the cove through the channel. This right of the plaintiff, however, was not his private property nor even his private right. It could not be bought, sold, leased, or inherited. He did not earn it, create it, or acquire it. He did not own it as against the sovereign. The right was the right of the public, the title and control being in the sovereign in trust for the public and for the benefit of the general public, and not for any particular individual. The plaintiff only shared in the public right. He had no right against the public. The sovereign had the absolute control of it, and could regulate, enlarge, limit, or even destroy it, as it might deem best for the whole public; and this without making or providing for any compensation to such individuals as might be inconvenienced or damaged thereby If, in the judgment of the sovereign, a railroad across a navigable channel of water, and completely obstructing its navigation, is of more benefit to the public than the navigation of the channel, it has the unrestricted power to thus close the channel to navigation, without making compensation to those who had been wont to use it. Every individual making use of a merely public privilege must bear in mind that he may be lawfully deprived of that privilege whenever the sovereign deems it necessary for the public good, and he must order his business accordingly.

". . . We regret that the plaintiff has been damaged by this new railroad being lawfully built across the channel he was wont to use, but he is only one of many thousands who are being individually damaged every day by the frequent lawful changes in the means and methods of manufacture and commerce, and yet cannot be said to be wronged by illegal acts."

The Texas Supreme Court in Chicago, R.I.&G. Ry. Co. v. Tarrant Co. Water Control & Imp. Dist., 123 Tex. 432, 73 S.W.2d 55 (1934) at page 67 stated:

"Any proper exercise of the powers of government, which does not directly encroach upon the property of an individual, or disturb him in its possession or enjoyment, will not entitle him to compensation, or give him a right of action. ("Incidental damages to property resulting from governmental activities, or laws passed in the promotion of the public welfare, are not considered a taking of the property for which compensation must be made.") If, for instance, the State, under its power to provide and regulate the public highways, should authorize the construction of a bridge across a navigable river, it is quite possible that all proprietary interest in land upon the river might be injuriously affected; but such injury could no more give a valid claim against the State for damages, than could any change in the general laws of the State, which, while keeping in view the general good, might injuriously affect particular interests. . . ." (Emphasis added.)

Based upon the above authorities, it is, therefore, our opinion that the Federal Government has a superior control of navigable streams. It is also our further opinion that the State, after approval by the Corps of Engineers, may construct a highway bridge over a navigable stream and an upstream landowner, even if his access to the Gulf of Mexico is obstructed, has no such right under the Constitution that he should be compensated for any loss of access from his upstream property to the Gulf of Mexico resulting from the construction of a highway bridge. This opinion does not discuss whether the new bridge would be an aid to navigation. See Opinion No. C-340.

Hon. James A. Morris, page 5, Opinion No. C-370


SUMMARY

The Federal Government has superior control of navigable streams.

The obstruction of access rights of an upstream landowner to the Gulf of Mexico by construction of a highway bridge is not a taking of property under the Constitution of Texas because the loss of access is only an incidental damage and noncompensable.

Yours very truly,

WAGGONER CARR
Attorney General of Texas



CHARLES R. LIND
Assistant Attorney General

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APPROVED:

OPINION COMMITTEE:

W. V. Geppert, Chairman
Bill Osborn
Grady Chandler
W. O. Shultz
Arthur Sandlin

APPROVED FOR THE ATTORNEY GENERAL
BY: Stanton Stone